

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1157 Local Government Prompt Payment Act

SPONSOR(S): Eisnaugle and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1056

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Military & Local Affairs Policy Committee	13 Y, 1 N	Noriega	Hoagland
2)	Economic Development & Community Affairs Policy Council		Noriega	Tinker
3)				
4)				
5)				

SUMMARY ANALYSIS

Current law states that it is the policy of this state that “payment for all purchases by local governmental entities be made in a timely manner.” The purpose of this policy is to provide for:

- prompt payments by local governmental entities and their institutions and agencies;
- interest payments on late payments made by local governmental entities and their institutions and agencies; and
- a dispute resolution process for payment of obligations.

This bill revises provisions relating to the timely payment for purchases of construction services and prohibits the assessment of damages against contractors if the list of items remaining to be completed (generally known as a “punch list”) is not provided to the contractor in a timely manner.

The bill requires that disputes be resolved according to procedures in invitations to bid or requests for proposals (RFPs), and revises provisions relating to the resolution of disputes concerning an improper payment request or invoice.

This bill provides that, in cases of payment disputes, a local governmental entity must notify the vendor in writing within 10 days after the improper payment request is received. Also, a local governmental entity waives its objection if it fails to begin a dispute resolution procedure within 45 days.

The bill removes language related to court proceedings, which broadens the ability of the prevailing party to be awarded court costs and attorney’s fees.

The bill also revises definitions and makes several minor, stylistic changes to chapter 218, F.S.

Staff estimates that local governments, including school districts, may incur some costs as a result of this bill. These expenses may include additional staffing costs to meet the conditions and deadlines provided in the bill, payment for construction services that may not meet the contract requirements if the deadlines are not met, and payment of court costs and attorney’s fees if, as the losing party, a local government had a reasonable basis in law or fact to dispute such payments, but ultimately did not prevail.

It does not appear that the provisions of this bill will have an impact on state government.

This bill has an effective date of July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Prompt Payment Act

Part VII of ch. 218, F.S., known as the "Local Government Prompt Payment Act" (Act) was enacted in 1989, and applies to local governments. The Act states that it is the policy of this state that "payment for all purchases by local governmental entities be made in a timely manner." The purpose of the act is to provide for:

- prompt payments by local governmental entities and their institutions and agencies;
- interest payments on late payments made by local governmental entities and their institutions and agencies; and
- a dispute resolution process for payment of obligations.

"Local governmental entity" is defined by the Act to mean a county or municipal government, school board, school district, authority, special taxing district, other political subdivisions, or any office, board, bureau, commission, department, branch, division or institution thereof.

The Act provides for timely payment for purchases of construction services and non-construction services, procedures for calculation of payment due dates, payment of interest at the rate of one percent per month (or the rate specified by contract, whichever is greater), and resolution of disputes. Local governmental entities must provide payment for construction services no later than 20 business days after the date on which the invoice is received, or within 25 business days if the invoice is subject to agent approval. Current law allots 15 days for both contractors and subcontractors to pay downstream to their subcontractors and suppliers once they have received payment from local governments.

Retainage

Retainage is a common construction contracting practice whereby a certain percentage of payment is withheld by the project owner from the general contractor and, in turn, by the general contractor from the subcontractors, to ensure satisfactory completion of a project. Payments for construction services usually are made incrementally, with a certain percentage withheld. Retainage is established by contract between the contractor and the entity contracting for the project.

Current law does not provide a limit on the amount of retainage state or local governments may withhold from payments for construction services.¹

Definitions

Section 218.72, F.S., provides the following definitions:

- “Proper invoice” refers to an invoice which conforms with all statutory requirements and with all requirements that have been specified by the local governmental entity to which the invoice is submitted;
- “Payment request” refers to a request for payment for construction services which conforms with all statutory requirements and with all requirements specified by the local governmental entity to which the payment request is submitted; and
- “Agent” refers to a project architect, project engineer, or any other agency or person acting on behalf of the local governmental entity.

Proposed Changes

The bill revises the definitions of “proper invoice” and “payment request” to provide that these requirements must be included in the invitation to bid or request for proposal (RFP) for the project for which the invoice or payment is requested, respectively.

The bill revises the definition of “agent” to provide that the agent who is required to review invoices or payment requests must be identified in the invitation to bid or RFP for the project for which payment request or invoices are submitted. This provision would result in having one receiving agent that would be identified in advance in the RFP.

Timely Payment for Purchases of Construction Services

Due Date

Present Situation

Section 218.735, F.S., provides guidelines for the timely payment for construction services purchases. Under this section, if an agent must approve the payment request or invoice prior to the payment request or invoice being submitted to the local governmental entity, payment is due 25 business days after the date on which the payment request or invoice is stamped as received.

Proposed Changes

The bill provides that “if the payment request or invoice is not rejected before the due date, it shall be deemed accepted.”

Payment Rejection

Present Situation

Section 218.735, F.S., states that the local governmental entity may reject the payment request or invoice within 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1), F.S.² The rejection must be written and must specify the deficiency in the payment request or invoice and the action necessary to make the payment request or invoice proper.

¹ In an e-mail dated March 15, 2010, the Department of Management Services (DMS) indicated that the standard amount of retainage throughout the construction industry for a project starts at 10 percent, but that there is an allowance for a reduction to 5 percent when 50 percent of the project has been completed.

² Section 218.74, F.S., refers to “procedures for calculation of payment due dates.”

Proposed Changes

The bill provides that if the payment request or invoice does not meet the contract requirements, the local entity must reject the payment request or invoice within 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1), F.S.

Dispute Resolution

Present Situation

Section 218.735, F.S., provides that if a dispute between the local governmental entity and the contractor cannot be resolved by the procedure in s. 218.735(3), F.S., the dispute must be resolved in accordance with the dispute resolution procedure prescribed in the construction contract or in any applicable ordinance. In the absence of a prescribed procedure, the dispute must be resolved by the procedure specified in s. 218.76(2), F.S.³

Proposed Changes

The bill provides that the applicable dispute resolution procedure is that which is included in the invitation to bid or RFP for the project for which the payment request or invoice is submitted. Also, the bill removes the statutory reference to s. 218.76(2), F.S. Therefore, this statutory guideline would no longer apply.

List of Items (Punch List)

Present Situation

Section 218.735, F.S., provides that each contract for construction services between a local governmental entity and a contractor must provide for the development of a list of items (generally known as a “punch list”) required to render complete, satisfactory, and acceptable the construction services purchased by the local governmental entity.

Proposed Changes

The bill adds language to provide that the contract must provide for the development of a single punch list for the construction services purchased by the local governmental entity.

This bill also adds language which provides that the final contract completion date must be at least 30 days after the delivery of the punch list. If the punch list is not timely provided to the contractor, the contract time for completion must be extended by at least 30 days after the contractor receives the punch list. Also, damages may not be assessed against a contractor for failing to complete a project within the time required by the contract if the punch list has not been provided to the contractor in a timely manner.

Retainage

Present Situation

Section 218.735, F.S., provides that warranty items may not affect the final payment of retainage as provided in this section or as provided in the contract between the contractor and its subcontractors and suppliers.

In addition, if a local governmental entity fails to comply with its responsibilities to develop the punch list for the construction services purchased by the local governmental entity, as defined in the contract within statutory limitations,⁴ the contractor may submit a payment request for all remaining retainage withheld by the local governmental entity pursuant to this section. The local governmental entity need

³ Section 218.76, F.S., refers to “improper payment request or invoice; resolution of disputes.”

⁴ Section 218.735(7)(a), F.S., provides for a 30-day timeline for construction projects having an estimated cost of less than \$10 million. Section 218.735(7)(b), F.S., provides for a 30-day timeline for construction projects having an estimated cost of \$10 million or more, unless otherwise extended by contract not to exceed 60 calendar days, after reaching substantial completion of the construction services purchased as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use.

not pay or process any payment request for retainage if the contractor has, in whole or in part, failed to cooperate with the local governmental entity in the development of the punch list or failed to perform its contractual responsibilities, if any, with regard to the development of the punch list or if s. 218.735(8)(f), F.S.,⁵ applies.

Proposed Changes

The bill provides that items not included in the punch list as required by statute may not be used to withhold final payment of retainage. In addition, the bill includes language to require final retainage payment within 20 business days unless the local governmental entity has provided a written notice to the contractor specifying the failure of the contractor to meet contract requirement in the development of the punch list.

Improper Payment Request or Invoice; Resolution of Disputes

Dispute Resolution Process

Present Situation

Section 218.76, F.S., provides for a dispute resolution process if a government entity files an objection to a request for payment. In addition, s. 218.76, F.S., provides that, in an action to recover amounts due under the Act, “the court shall award court costs and reasonable attorney’s fees, including fees incurred through any appeal, to the prevailing party, if the court finds that the nonprevailing party withheld any portion of the payment that is the subject of the action without any reasonable basis in law or fact to dispute the prevailing party’s claim to those amounts.”

Proposed Changes

The bill provides that if an improper payment request or invoice is submitted by a vendor, the local governmental entity must notify the vendor in writing within 10 days after the improper payment request is received.

The bill adds language to provide that if the local governmental entity does not begin the dispute resolution procedure within 45 days, the objection to payment is deemed to have been waived. Also, the time for dispute resolution may be extended upon the written agreement of the affected parties.

This bill removes language related to court proceedings. Under this bill, prevailing parties in legal disputes related to the Act would be awarded court and legal fees, even in cases when the losing party claimed to have a reasonable basis in law or fact to dispute such payments.

Other Comments

The bill makes several minor, stylistic changes to ch. 218, F.S., and provides an effective date of July 1, 2010.

B. SECTION DIRECTORY:

Section 1. Amends s. 218.72, F.S., relating to definitions.

Section 2. Amends s. 218.735, F.S., relating to timely payment for purchases of construction services.

Section 3. Amends s. 218.76, F.S., relating to improper payment request or invoice; resolution of disputes.

Section 4. Provides an effective date.

⁵ Section 218.735(8)(f), F.S., does not require the local governmental entity to pay or release any amounts that are the subject of a good faith dispute, the subject of a claim brought pursuant to s. 255.05, F.S., or otherwise the subject of a claim or demand by the local governmental entity or contractor refers to “improper payment request or invoice; resolution of disputes.”

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Staff estimates that local governments, including school districts, may incur some costs as a result of this bill. These expenses may include additional staffing costs to meet the conditions and deadlines provided in the bill, payment for construction services that may not meet the contract requirements if the deadlines are not met, and payment of court costs and attorney's fees if, as the losing party, a local government had a reasonable basis in law or fact to dispute such payments, but ultimately did not prevail.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may result in more timely payments to contractors, subcontractors and suppliers who provide services or supplies for construction projects. In addition, contractors, subcontractors and suppliers could earn interest payments if local governments are unable to meet the required payment timelines. Also, because the number of instances when local governments may not meet the established payment timelines cannot be predicted, neither can the amount of interest that would accumulate.

Contractors, subcontractors, and suppliers could also incur expenditures when filing suit to enforce the provisions of this bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision appears to apply because this bill may require counties or municipalities to spend funds or take an action requiring the expenditure of funds. However, the amount of the expenditures is indeterminate at this time, and therefore it is unclear if an exemption would apply.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue

The bill's proposed language for s. 218.735(7)(i), F.S., requires final retainage payment within 20 business days. The bill does not specify when the proposed 20-day period would begin.

Other Comments

Associated Builders and Contractors, Inc., Florida, (ABC) is a proponent of this bill. According to ABC, the commercial construction industry has observed that local government is oftentimes anything but "prompt" in their payment for services/goods received, in part because of unnecessary and cumbersome procedures. In addition, ABC has stated that, ironically, the failure of government to abide by the Prompt Pay Act disproportionately hurts Florida small businesses (which have the most difficult "cash flow" challenges). Therefore, ABC is a proponent of streamlining these procedures and increasing efficiencies.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES